

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

TRACI GRAY,

Defendant.

ORDER

11-cr-13-bbc-1

In an indictment returned on January 19, 2011, the grand jury charged defendants Traci Gray and Samantha Johnson with participating in a mortgage fraud conspiracy with Brian K. Bowling and his company, Platinum Concepts. Dkt. #10. Before the court is defendant Gray's motion to dismiss the two-count indictment against her on the ground that the government obtained the indictment by disclosing materially false evidence to the grand jury. Dkt. #38.

To obtain dismissal on this ground, Gray must show prejudice amounting to either proof that the grand jury's decision to indict her was substantially influenced by testimony inappropriately before the grand jury or that there is grave doubt that the decision to indict was substantially influenced by such testimony. This would include the government's

knowing use of false testimony. United States v. Useni, 516 F.3d 634, 656 (7th Cir. 2008). Further, any government use of false testimony would violate due process only if the government failed to correct that testimony, presumably in a timely manner. United States v. Burke, 425 F.3d 400, 412 (7th Cir. 2005). Gray has not shown any knowing use of false testimony by the government. Although the case agent made one inadvertent misstatement, it was sufficiently—albeit obliquely—corrected during the same grand jury session. In any event, Gray has not shown any prejudice from the government’s presentation of its case to the grand jury. Accordingly, I am denying Gray’s motion to dismiss the indictment.

The indictment charges Gray in count 1 with conspiring in 2006 with co-defendant Johnson, Bowling and others to violate 18 U.S.C. §1014 by making false statements in a Universal Residential Loan Application, Form 1003, for the purpose of influencing the lending decision by the federally insured lender. Count 2 charges Gray and Johnson with a substantive violation of § 1014 on November 15, 2006, when they signed and submitted to the lender a materially false residential loan application form in which they (1) inflated their gross monthly income amounts; (2) misrepresented their present and former address history; (3) misrepresented their employment history; and (4) misrepresented Johnson’s intent to use the residence as a primary residence. Dkt. #10.

Count 1 explains that defendants worked with Bowling to obtain a “stated income loan” in the amount of \$273,700 from Fremont Investment and Loan to pay for a \$322,000

single-family residence they had purchased in Prairie du Sac. A \$48,000 second mortgage from the home builder provided the rest of the financing. Count 1 charges that the defendants made material false statements in their loan application form and omitted material information by failing to list their dependents, failing to list their child support income and failing to disclose that defendant Johnson did not intend to pay the mortgage or live at the house, but was listed as the primary borrower to help defendant Gray qualify for the requested loan.

When presenting its proposed indictment to the grand jury, the government relied primarily on the testimony of Special Agent Thomas Trier. According to Gray, Trier made the following false statements to the grand jury:

(1) Agent Trier indicated that a second mortgage never was reported on the HUD-1 Statement, when a copy of the HUD-1 Statement, which Agent Trier offered as a grand jury exhibit, showed that the second mortgage was listed thereon. According to Gray, there is no indication that Agent Trier actually showed the HUD-1 Statement to the grand jury or discussed it with the grand jurors.

(2) Agent Trier told the grand jury that Richard Hinrichs, the person who built the home and sold it to Gray and Johnson, paid a \$1500 filing fee to Gray. According to Gray, Hinrichs paid a \$1500 finder's fee to Johnson, but paid nothing to Gray.

(3) Agent Trier told the grand jury that on the date of the closing, Hinrichs paid \$5000 to Gray and Hinrichs "made an invoice up" to indicate that the money was for a home warranty, when in fact Hinrichs gave Gray the money so that she could buy drapes and other things for the home. According

to Gray, Hinrichs previously had testified to the grand jury that he paid Gray \$5000 in lieu of a home warranty.

According to Gray, Agent Trier's statements to the grand jury were misleading and could have caused it to indict Gray even though the statements were not true. Aff. in Supp. of M. to Dismiss Indictment, dkt. #58.

In response, the government contends that Agent Trier did not provide any false testimony to the grand jury. At worst, at one point he mistakenly attributed Johnson's finder's fee to Gray, but provided correct testimony on the same point later in his testimony.

Taking Gray's assertions in order, the government contends that Agent Trier provided accurate testimony to the grand jury about the HUD-1 form. Agent Trier told the grand jury that the plan between the alleged conspirators was that Hinrichs would provide a second mortgage to Gray and Johnson, but that after closing, he would forgive the mortgage. The government reports that this is what actually happened. According to the government, the HUD-1 was false because it did not report this plan to forgive the mortgage. This is Agent Trier's testimony on this point:

The seller of the house was a guy named Dick Hinrichs . . . who was a builder. The offer to purchase was for \$322,000, and initially they had agreed that Hinrichs would take back a second mortgage for \$32,000; however, Brian said they had increased that amount to \$48,300 to make sure that Traci wouldn't have to come up with cash for the down payment. The plan was to forgive the second mortgage, but in order to qualify they had to have the second mortgage on the loan application.

This wasn't reported on the HUD-1 and that made the HUD-1 false.

Jan. 19, 2011 testimony of Trier, tr. trans. at 7, dkt. #38-2. As Gray acknowledges in her motion, Agent Trier provided the HUD-1 form to the grand jury as an exhibit and this form does list the second mortgage. It is clear from all this that Agent Trier was not testifying that the HUD-1 form was false because it failed to list the second mortgage; instead he was testifying that the form was false because it failed to report that the parties planned to forgive the second mortgage, which had been put on the form solely to qualify the purchasers for the first mortgage. Therefore, his testimony was not false. This is not a basis on which to dismiss the indictment.

As for Gray's second point, the government concedes that Agent Trier incorrectly stated that Hinrichs paid \$1500 to Gray, but argues that in context, his error was an unintentional misstatement that was discernible as a misstatement at the time. The government argues that any momentary confusion would have been dissipated when Agent Trier later stated correctly that Johnson had received the \$1500 finder's fee while Gray got the \$5000 rebate from Hinrichs, and the grand jury received copies of both checks as exhibits. Dkt. #81-2.

Having considered the grand jury transcripts, dkts. ## 38-4 and 81-1 and the photocopies of the checks, dkt. # 81-2, I conclude that Agent Trier's misstatement was

unintentional and unknowing and that he corrected it with additional accurate testimony that was corroborated by the photocopies of the checks. This is not a basis on which to dismiss the indictment.

In response to Gray's third claim, the government asserts that Agent Trier testified accurately about Hinrichs's \$5000 payment to Gray. Gray has supplied a portion of Hinrichs's February 17, 2010 testimony to the grand jury in which he discusses this payment:

A. . . . What I — What I said here is that — that just the discount was only on the — it wasn't on the —

Q. The carbon?

A. It wasn't on the original, it was on the document.

Q. Correct. The original that Traci would have had would have just said — would have made it look like she bought a warranty. On your carbon copy you wrote down just a discount so you knew —

A. But it was — it definitely was, but you can call it what you want. I can call it — It's a discount on the whole thing. But what she did is bought the one-year warranty, because I said to Traci, hey I don't want anything to do with this house, and she needed money to buy drapes and — and the house was empty.

Q. Okay. But's not what it says.

A. I know that's not what it says. But I said to her, I'll give you a check for \$5,000, but if there is anything happens to this house, don't call me, Traci. Don't call me.

Q. But Dick, you're not —

A. Here's \$5,000, take it and put it in a fund and — and if something happens, use it. And she says, well, but — but I need drapes and I need a table to eat off of and I need all this stuff. And I said, hey, Traci, do whatever you want with it, I don't care. But that's why it's written like it is.

Q. But see, the way it's written doesn't back up what you just said. You're saying that you said that you were going to basically in lieu of a warranty pay five grand to get out from underneath a warranty?

A. Yeah.

Q. That's not what it says. It says that she — From Traci, Traci's going to buy a one-year structural warranty. If she's buying it, then she should be paying you, not the other way around, that's what it says.

A. No, then I — then I messed up the top then because what is meant is for her to take over responsibility —

Q. See, it doesn't say that. It says one-year structural warranty, not forever, just says for one year.

Dkt. #38-6.

Eleven months later, on January 19, 2011, Agent Trier provided this testimony to the grand jury:

In order to make the loan go through Brian told Dick that he had to forgive that second mortgage because they couldn't pay it back anyway. After the closing Dick Hinrichs paid \$1,500 to Samantha Johnson as a referral fee and he actually paid a

\$5,000 check on the day of closing to Traci Gray. He made an invoice up that said it was for a home warranty, but he said that he gave her the money because she needed to buy drapes and things for the home.

Dkt. #38-5. During that same grand jury appearance, Agent Trier provided this testimony in response to questioning by the government:

Q: Okay, now did you find there was money paid outside the closing?

A. Yes.

Q. And if we look at TT4 there is checks on that day?

A. Yes, from Hinrichs Construction, which is Dick Hinrichs

Q. Yep.

A. This is from his account. On the closing 11-15-06 writes a check for \$5000 to Traci Gray, and that same closing he writes \$1,500 to Samantha Johnson.

* * *

Q. All right. When you went to Hinrichs did you find he had created some invoices?

A. Yes.

Q. All right. So here TT5, page one, here's an invoice, I know it's hard to read, to Traci where she's so-called is buying a one-year — a one-year lease?

A. Correct. At the house that she bought.

Q. One-year warranty?

A. 2019 Sandhill. . . .

* * *

Q. So why — if she’s — this makes no sense. She’s buying a warranty but he’s paying her five grand.

A. Right.

Dkt. #81-1. The document being discussed is a blank invoice form on which Hinrichs wrote that it was from Traci Gray to Hinrichs Construction “To buy one year structural [*sic*] warranty on house at 2019 Sandhill, Prairie Du Sac, Wi”; “Just a disc.”; “Pd Ck.#5187.”
Dkt. #81-3.

Although all of this testimony to the grand jury about the \$5000 transaction between Hinrichs and Gray was hardly pellucid, it is clear enough that Hinrichs “made up” the one-year warranty document, which did not accurately commemorate any aspect of the actual agreement. In other words, Agent Trier did not present false testimony about this document to the grand jury. This is not a basis to dismiss the indictment.

Finally, even if there were any weight to Gray’s assertions that Agent Trier lied to the grand jury—and there is none—Gray did not even attempt to establish prejudice until her reply brief. Dkt. #86. Her arguments on this point are unpersuasive. Counts 1 and 2 both attribute four types of false statements to Gray and Johnson in their mortgage application form: (1) they inflated their gross monthly income; (2) they misrepresented their present

and former address history; (3) they misrepresented their employment history; and (4) they misrepresented Johnson's intent to use the residence as a primary residence. None of the allegedly false statements by Agent Trier to the grand jury even touch on these topics. In count 1, the grand jury alleges that defendants' loan application (1) failed to list defendants' dependents; (2) failed to list or identify defendants' child support income; and (3) failed to disclose that Johnson did not intend to live at the residence or pay the mortgage. Finally, count 1 alleges that it was part of the conspiracy that defendants caused to be submitted the HUD-1 form that failed to show that defendants and third parties exchanged money in relation to the house sale that was not disclosed at the closing. The HUD-1 contretemps is relegated to the seventh of seven specified parts of the conspiracy, and it accurately (if vaguely) characterizes the omission of Hinrichs's \$5000 payment to Johnson.

In light of all this, Gray's arguments regarding prejudice from the alleged misstatements amount to knocking down the straw men she erected in her opening brief. The fact that Gray is able to tease some ambiguity out of a few of Agent Trier's statements to the grand jury does not provide a basis on which to dismiss the indictment returned against her in this case.

ORDER

IT IS ORDERED that defendant Traci Gray's motions to dismiss the indictment is DENIED.

Entered this 1st day of June, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge